

NORTHWEST DEFENDERS ASSOCIATION

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April 30, 2010

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Mr. Ronald Carpenter, Clerk
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0920

Attention: Camilla Faulk

Dear Mr. Carpenter:

I am the Supervisor of the Northwest Defenders Association Dependency Unit. My office is a public defender agency and represents parents and children in Dependency and Termination proceedings in which the State is seeking to remove children from the parent's custody or to terminate parental rights. The proposal to routinize the practice of "phoning in" testimony in dependency and termination of parental rights cases greatly concerns me, particularly in light of the times I have seen testimony provided over the phone. Any rule adopted that allows testimony to be presented this way must include significant safeguards I do not see in the proposed rule.

Allowing a witness to "phone in" for a dependency or termination of parental rights trial undermines the seriousness of the proceedings. It gives neither the Court nor opposing counsel an opportunity to see the demeanor and credibility of the witness. Dealing with a disembodied voice rather than being in the presence of a witness with documents limits an attorney's ability to cross examine witnesses and prejudices the client's participation in the proceeding.

I have personally represented clients in two cases in King County where a witness testifying over the phone clearly used a file, records on a computer screen, outline and notes in preparation for testimony while testifying. In trial, parties would ordinarily have the right to review what the witness was referring to, and even admit those documents as an exhibit. In one of the two cases, the witness was admitted that she did have the materials and was asked to remove them by the Court. This solution is not good enough. In the other case I am confident the professional continued to read from and refer to notes that had not been provided in discovery.

It is impossible to share exhibits with a witness testifying over the phone, making it impossible to deal with any documentary evidence. There is no meaningful way to impeach the witness with documents. It is also difficult to lay foundation, refer to exhibits, authenticate exhibits, etc. I have seen two judges grow irritated with opposing counsel because it was clear

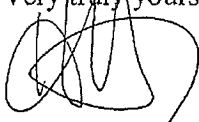
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that the witness would need to be present in order for there to be a complete cross-examination. The process did not save anyone time.

Finally, parents and children in dependency and termination actions have a right to representation by counsel and, if indigent, to have counsel appointed by the court. RCW 13.34.090 and JuCR 9.2(c) (2). Parties have a right to effective counsel. Allowing witnesses to phone in their testimony undermines counsel's ability to be an effective advocate. It is inappropriate in these serious matters absent exceptional circumstances or mutual agreement. If it is permitted stringent safeguards must be in place to ensure that the opposing party has an opportunity to effectively cross-examine the testifying witness.

Perhaps a compromise position is that in dependency and termination proceedings, the party who will be proffering testimony by phone should move for an order allowing such testimony and outlining the terms under which it may be provided. Telephonic testimony can be helpful in cases where an appearance would be a significant economic hardship, where a witness is incarcerated or is severely ill. However the presumption, the strong presumption, should be against receiving testimony by phone.

Very truly yours,



Holly Hermon
Northwest Defenders Association
Dependency Unit